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In the Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE, ET. AL., PETITIONERS
v.
NEIL LEIST, ET AL.

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., PETITIONER
v.
NEIL LEIST, ET AL.

HEINOLD COMMODITIES, INC., ET AL., PETITIONERS
v.
NEIL LEIST, ET AL.

HEINOLD COMMODITIES, INC., ET AL., PETITIONERS
v.
NATIONAL SUPER SPUDS, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Congress' comprehensive reform in 1974 of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, extinguished the private civil action that had previously been recognized to exist for traders in a commodity futures contract against (i) a commodity exchange that breached its statutory duties to enforce its rules (Section 5a(8) of the Act, 7 U.S.C. 7a(8)) and to prevent manipulation of the price of the contract traded on the exchange (Section 5(d) of the Act, 7 U.S.C. 7(d)); and (ii) futures commission merchants who participated in the price manipulation in violation of Section 9(b) of the Act, 7 U.S.C. 13(b).

TABLE OF CONTENTS

	Page
Interest of the Commodity Futures Trading Commission	2
Statement:	
A. Introduction	3
B. The May 1976 potato futures contract default	4
C. District court proceedings	4
D. The court of appeals decision	5
Summary of argument	6
Argument:	
I. When Congress comprehensively amended the Commodity Exchange Act in 1974, it was aware that the courts had uniformly implied private rights of action under the Act, and it indicated no intention to overrule those decisions or abolish those remedies	8
A. Without exception, the courts recognized that traders could bring private actions under the Commodity Exchange Act before 1974	8
B. Congress was aware in 1974 that the federal courts had been adjudicating private claims under the Act	10
C. Congress evidenced no intention to abrogate the private rights of action that existed when it amended the Act in 1974	12
II. Congress in 1974 affirmatively demonstrated its intent that private rights of action continue to be available under the Act	17
A. The exclusive jurisdiction provision and the judicial savings clause in Section 2(a)(1) of the Act are predicated upon the continued existence of private rights of action	17

Page

B. In enacting Sections 5a(12) and 8a(7) of the Act, Congress ensured that contract markets would continue to be subject to private damage actions for failing to discharge their self-regulatory duties 22

C. The evidence of congressional intent to preserve private rights of action under the Act is far more compelling than that which this Court found sufficient to create a private remedy *in Cannon*. 24

Conclusion 27

TABLE OF AUTHORITIES

Cases:

Anderson v. *Francis I. duPont & Co.*, 291 F. Supp. 705 8

Arnold v. *Bache & Co.*, 377 F. Supp. 61 8

Booth v. *Peavey Company Commodity Services*, 430 F.2d 132 8

Brown v. *GSA*, 425 U.S. 820 13

California v. *Sierra Club*, No. 79–1252 (Apr. 28, 1981) 13

Cannon v. *University of Chicago*, 441 U.S. 677 ..... 7, 13, 14, 15, 17, 24, 25

Case & Co. v. *Board of Trade of the City of Chicago*, 523 F.2d 355 9

Cort v. *Ash*, 422 U.S. 66 ..... 5, 26

Deaktor v. *L.D. Schreiber & Co.*, 479 F.2d 529, rev'd on other grounds *sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 ..... 8, 9, 10, 12

Edmonds v. *Compagnie General Transatlantique*, 443 U.S. 256 13

Erie Railroad v. *Tompkins*, 304 U.S. 64 19

Goodman v. *H. Hentz & Co.*, 265 F. Supp. 440 8

Gordon v. *Shearson Hayden Stone Inc.*, 2 Comm. Fut. L. Rep. (CCH) ¶21,016 (Apr. 10, 1980), appeal pending, No. 80–7212 (9th Cir.) 5

	Page
Gould v. *Barnes Brokerage Co.*, 345 F. Supp. 294	8
Great Northern Ry. v. *Merchants Elevator Co.*, 259 U.S. 285	19
Hecht v. *Harris, Upham & Co.*, 283 F. Supp. 417, modified, 430 F.2d 1202	8
Johnson v. *Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764	8
Lorillard v. *Pons*, 434 U.S. 575	14
McCurnin v. *Kohlmeyer & Co.*, 340 F. Supp. 1338	8
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, cert. granted, No. 80–203 (Apr. 20, 1981)	2
Morton v. *Mancari*, 417 U.S. 535	14
NLRB v. *Gullett Gin Co.*, 340 U.S. 361	14
Northwest Airlines v. *Transport Workers Union of America, AFL–CIO*, No. 79–1056 (Apr. 20, 1981)	17
P. J. Taggare Co. v. *New York Mercantile Exchange*, 476 F. Supp. 72	19
Pan American Petroleum Corp. v. *Superior Court of Delaware for New Castle County*, 366 U.S. 656	19
Posadas v. *National City Bank*, 296 U.S. 497	14
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218	19
Rivers v. *Rosenthal & Co.*, 634 F.2d 774, petition for cert. pending, No. 80–1542 (filed Mar. 10, 1981)	9, 17
Seligson v. *New York Produce Exchange*, 378 F. Supp. 1076, aff'd on other grounds, 550 F.2d 762, cert. denied, 434 U.S. 823	8
Smith v. *Groover*, 468 F. Supp. 105	20
T.I.M.E. Inc. v. *United States*, 359 U.S. 464	13
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11	6–7, 13, 15, 16, 19
TVA v. *Hill*, 437 U.S. 153	8
United Egg Producers v. *Bauer International Corp.*, 311 F. Supp. 1375	8
United States v. *Brien*, 617 F.2d 299, cert. denied, 446 U.S. 919	19
Universities Research Ass'n, Inc. v. *Coutu*, No. 78–1945 (Apr. 6, 1981)	17
Wood v. *United States*, 41 U.S. (16 Pet.) 342	15

Statutes and regulation: Page
Commodity Exchange Act, 7 U.S.C. (& Supp. III)
1 *et seq*. 2
7 U.S.C. (1970 ed.) 2. 10
7 U.S.C. (Supp. III) 2. . . . . 2, 3
7 U.S.C. 2(a)(1). 17, 18, 21, 25
7 U.S.C. 5. 26
7 U.S.C. 6. 3
7 U.S.C. 6a. 5
7 U.S.C. 6a(4). 5
7 U.S.C. (1964 ed.) 6b. 8
7 U.S.C. 6b. 2, 5
7 U.S.C. 6b(A). 5
7 U.S.C. 6d. 16
7 U.S.C. 6e. 16
7 U.S.C. 6h. 3
7 U.S.C. 6k. 16
7 U.S.C. 6m. 16
7 U.S.C. (1970 ed.) 7a(8). 9, 10, 12, 14, 22, 23
7 U.S.C. 7a(8). 4, 14, 23, 24, 26
7 U.S.C. 7a(12). 22, 23
7 U.S.C. (1970 ed.) 7(d). 10
7 U.S.C. 7(d). 4, 25, 26
7 U.S.C. 7(g). 3
7 U.S.C. (1970 ed.) 8(a). 10
7 U.S.C. (1970 ed.) 9. . . . . 10, 22
7 U.S.C. 9. . . . . 2, 22, 26
7 U.S.C. 9a. 20
7 U.S.C. 12a(7). 22, 23, 26
7 U.S.C. (1970 ed.) 13a. 21
7 U.S.C. 13a. 20, 22
7 U.S.C. (1970 ed.) 13(b). 14
7 U.S.C. 13a–1. 15
7 U.S.C. (Supp. III) 13a–2. 20
7 U.S.C. (& Supp. III) 13(b). 2, 14, 26
7 U.S.C. (1970 ed.) 13(b). 9, 10
7 U.S.C. (1970 ed.) 13b. 10, 14, 22, 26
7 U.S.C. 13b. 2, 26
7 U.S.C. 18. 15
7 U.S.C. 18(a). 15, 16
7 U.S.C. 18(e). 15
7 U.S.C. 18(g). 22

Page

Commodity Exchange Act, ch. 545, 49 Stat. 1491 *et seq*. 10
Commodity Exchange Act Amendments of 1968, Pub. L. No. 90–258, 82 Stat. 26 *et seq*. 10
Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93–463, Section 407, 88 Stat. 1413–1414 14
Grain Futures Act, ch. 369, 2 Stat. 998 *et seq*. 10, 25
42 Stat. 999. 26
28 U.S.C. 1332. 19
17 C.F.R. 141. 23

Miscellaneous:
Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry, 93d Cong., 2d Sess., Pts. 1–3 (1974) 11, 12, 20, 21
Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Comm. on Agriculture, 93d Cong., 2d Sess. (1974) 11, 12
80 Cong. Rec. 8289–8293 (1936). 26
119 Cong. Rec. 41333 (1973). 12, 22
120 Cong. Rec. (1974):
pp. 10736–10737. 23
p. 10739. 26
p. 10740. 26
p. 10742. 26
p. 10748. . . . . 12, 23
p. 30458. 26
p. 30459. . . . . 17, 20, 21, 22
p. 30462. 23
p. 30463. 10
p. 30464. 19
p. 30466. 26
p. 30467. 26
p. 34736. 18
p. 34737. 22
pp. 34737–34720. 14
p. 34997. . . . . 18, 22

Page

p. 34999 26
p. 35000 26
Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Comm. On Agriculture, 93d Cong., 1st Sess. (1973) 11
H.R. 13113, 93d Cong. 2d Sess. (1974) 20, 21
§ 201 20
H.R. Rep. No. 421, 74th Cong., 1st Sess. (1935) 2, 5
H.R. Rep. No. 743, 90th Cong., 1st Sess. (1967) 26
H.R. Rep. No. 93–963, 93d Cong., 2d Sess. (1974) .. 10
H.R. Rep. No. 93–975, 93d Cong., 2d Sess. (1974). 10, 12, 14, 16, 22, 23
H.R. Rep. No. 95–1181, 95th Cong., 2d Sess. (1978). 20
Johnson, *The Perimeters of Regulatory Jurisdiction Under The Commodity Futures Trading Commission Act*, 25 Drake L. Rev. 61 (1975) 16, 18
S. 2485, 93d Cong., 1st Sess. (1973) 10
S. 2837, 93d Cong., 1st Sess. (1973) 10, 15
§ 505(a) 15
S. Conf. Rep. No. 93–1194, 93d Cong., 2d Sess. (1974) 12, 18, 22
S. Rep. No. 93–1131, 93d Cong., 2d Sess. (1974) 10, 12, 14, 16, 21
S. Rep. No. 95–850, 95th Cong., 2d Sess. (1978). 15, 16, 20

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INTEREST OF THE COMMODITY FUTURES TRADING COMMISSION

The Commodity Futures Trading Commission is an independent federal agency created by Congress in 1974 to administer the Commodity Exchange Act, 7 U.S.C. (& Supp. III) 1 *et seq.* The Act establishes a pervasive and exclusive scheme for regulating the trading of commodity futures contracts in the United States. See 7 U.S.C. (Supp. III) 2.

The primary goal of the Act is "to insure fair practice and honest dealing on the commodity exchanges * * *." H.R. Rep. No. 421, 74th Cong., 1st Sess. 1 (1935). Congress has enacted two types of prohibitions that are essential to accomplishing this goal. The Act prohibits the manipulation of the price of a futures contract (7 U.S.C. (& Supp. III) 9, 13(b), and 13b) and prohibits commodity professionals from defrauding their customers (7 U.S.C. 6b). The Commission's interest here concerns the aspects of these cases relating to price manipulation.[1]

The court of appeals upheld the right of members of the public who trade in the futures markets to obtain civil redress from commodity exchanges that fail adequately to enforce their rules and to protect their marketplaces from price manipulation. The court of appeals also held that such traders may bring private actions against futures commission merchants who participate in price manipulations. In the Commission's view, this decision is correct and accords with the congressional intent underlying the provisions of the Act involved here. In addition, because establishing that a manipulation has occurred, or that an exchange has breached its self-regulatory duties, often requires costly and complex litigation, private rights of action in this context are particularly important supplements to the Commission's enforcement efforts. Moreover, the possibility of private suits provides a meaningful incentive for commodity exchanges to exercise an appropriate degree of vigilance in performing their self-regulatory duties, including the prevention of market manipulations and other abuses. Thus, the Commission has a strong interest in the question whether private rights of action continue to be available under the Act.

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[1] See page 5, note 2, *infra*. On April 20, 1981, this Court granted the petition for a writ of certiorari in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203, which presents the question whether a customer has a private right of action against its futures commission merchant for fraud in violation of 7 U.S.C. 6b.

STATEMENT

A. INTRODUCTION

A commodity futures contract is a standardized agreement to purchase or sell a fixed quantity of a particular commodity; the quality or grade of the commodity to be purchased or sold, as well as the month and place of delivery, are specified in the contract (A. 88). Contracts may be lawfully traded only through a board of trade ("commodity exchange") that has been designated by the Commission as a "contract market" for the particular commodity. See 7 U.S.C. 6, 6h, 7(g). The price of the commodity, the only term not specified in the contract, is set by open bidding in a designated floor trading area (the "pit" or "ring") of the exchange. Members of the public place orders for contracts through brokers ("futures commission merchants") who are responsible for executing and confirming the orders and for maintaining records of their customers' positions and completed transactions (see 7 U.S.C. (Supp. III) 2; A. 90–91). A contract is formed whenever there is a match in the pit between a bid and an offer (A. 90–91). The party promising to deliver the commodity under the contract is called the "short"; the party promising to take delivery is called the "long" (A. 89). Delivery actually occurs in only about 2–3% of all futures transactions, however, because most contract positions are liquidated by traders who offset their "long" and "short" positions (A. 89–90 & n.2).

Members of the public who trade in these contracts are classified as "hedgers" or "speculators." Hedgers are typically persons engaged in the production, distribution, or processing of a commodity or its byproducts, and they typically trade in the futures market to insure against loss. For instance, a grower of potatoes may establish a "short" position in the futures contract for potatoes to minimize the risk of a decline in the price of potatoes between planting and sale. A speculator, on the other hand, is typically not engaged in a commercial enterprise that produces or uses the particular commodity in which he trades, but hopes to profit by successfully anticipating price movements. The futures markets function successfully only when speculators are trading in the markets and assume the risk of price movements that hedgers seek to avoid (A. 92–94).

B. THE MAY 1976 POTATO FUTURES CONTRACT DEFAULT

These cases arise out of an unprecedented default by certain "short" traders with respect to the May 1976 potato futures contract that was traded through the facilities of petitioner New York Mercantile Exchange (A. 95–105). The "short" traders placed their contract orders through petitioners Clayton Brokerage Co. of St. Louis, Heinold Commodities, and Thomson & McKinnon Auchincloss Kohlmeyer, all of whom are registered futures commission merchants. Essentially, the "short" traders established substantial "short" positions, which they failed to liquidate; they were therefore required under the contract to make delivery of the potatoes, which they were unable to do (A. 97).

Respondents are traders who held "long" positions in the contract. They brought these actions in the United States District Court for the Southern District of New York, seeking damages for the substantial harm they allegedly suffered because of petitioners' violations of the Act. Although respondents had liquidated their "long" positions before the "short" traders defaulted, the "long" traders claim that they were injured because of the "short" traders' and futures commission merchants' manipulation of the contract price, which allegedly precipitated the default (A. 15–59). Certain respondents also contend that they suffered financial injury because the Exchange allowed this price manipulation to occur (although it knew or should have known of these practices) in violation of the Exchange's rules, and despite its statutory duties to prevent manipulation (7 U.S.C. 7(d)) and to enforce its rules (7 U.S.C. 7a(8)). See A. 34–35. One respondent also contends that the Exchange's actions violated the federal antitrust laws (A. 7–14).

C. DISTRICT COURT PROCEEDINGS

After respondents' actions had been consolidated and discovery was completed, the Exchange and the futures commission merchants moved for judgment on the pleadings or, alternatively, for partial summary judgment. Among other things, they claimed that a private right of action no longer existed under the Commodity Exchange Act, and the district court granted partial summary judgment on that ground (A. 76–77).

The court acknowledged that private rights of action had been recognized under the Act before 1974 (A. 66), but it noted that the Act had been "amended extensively" in 1974 (A. 67) and concluded that a private cause of action had not survived the 1974 amendments (A. 74–75). Relying on the test articulated by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975), the district court held that "there is no private right of action under the Act because the two critical elements of the test, congressional intent and consistency with the statutory scheme, weigh strongly against the implication of such a right" (A. 71–72; footnote omitted).

D. THE COURT OF APPEALS DECISION

The court of appeals reversed by divided vote (A. 83–249), holding that private rights of action should continue to be available under the Act with respect to the statutory violations allegedly committed by petitioners.[2] Writing for the majority, Judge Friendly thoroughly reviewed the language, structure, and legislative history of the Act against the requirements of *Cort*, but found this case to involve "one differentiating factor of * * * transcendent importance" in that "the decisions prior to the 1974 amendments had uniformly upheld the existence of

[2] Among other things, the court of appeals stated (A. 171–173) that the complaints here may have been sufficient to allege violations of Sections 4a and 4b of the Act, 7 U.S.C. 6a and 6b. In the Commission's view, respondents' allegations are insufficient to establish violations of these sections. Section 4a of the Act generally prohibits traders who are speculators from exceeding position limits established by the Commission. Futures commission merchants, like certain of the petitioners, cannot be held to have violated this prohibition except in circumstances where they are trading for their own account or benefit. 7 U.S.C. 6a(4). In this case, it is alleged merely that these petitioners "permitted" their customers to exceed speculative limits (A. 54). Section 4a does not reach this form of broker activity. See H.R. Rep. No. 421, 74th Cong., 1st Sess. 5 (1935). Similarly, a violation of Section 4b will be found only where the party committing the alleged fraud acted "for or on behalf of" the defrauded party. 7 U.S.C. 6b(A). See *Gordon* v. *Shearson Hayden Stone Inc.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,016, at 23,976, 23,980–23,981 (Apr. 10, 1980), appeal pending, No. 80-7212 (9th Cir.). Compare A. 171–173. In this case, it is not alleged that the petitioner futures commission merchants were acting "for or on behalf of" the allegedly defrauded persons, and the complaints therefore fail to state a violation of Section 4b. Accordingly, we do not here address the question whether a private right of action exists under these sections.

a private cause of action under the provisions of the Commodity Exchange Act, and * * * the 1974 Congress was well aware of the existing state of the law" (A. 127). Thus, the court found that the question presented was not "whether Congress intended to create a new private right of action in 1974, but rather whether it intended *sub silentio* to alter the significance that had long been given these provisions by making other changes in the Act" (*ibid.*).

Because Congress recognized that "speculators" perform an essential role in the futures markets, the court of appeals found that such persons were within the class to be protected by the Act (A. 129–137). The court also noted that the 1974 Congress, rather than evidencing an intent to eliminate private rights of actions, had enacted a provision to preserve explicitly the jurisdiction of the courts with respect to commodity claims (A. 144–146, 150). The court found that the insertion of this provision, especially when considered in light of Congress' clear understanding that private causes of action had previously been implied under the Act, made "irresistible" the conclusion that "Congress desired their continued recognition" (A. 156). Finally, the court found that recognition of private rights of action was both consistent with and helpful to the purposes of the Act, and that this area had not traditionally been subject to state law (A. 169–170).

Judge Mansfield dissented. He was not persuaded that a private right of action had been implied before 1974 in circumstances such as those presented here (A. 222–223). Moreover, Judge Mansfield disagreed with the majority's statement of the issue. In his view, the issue was properly analyzed in terms of whether the evidence showed that Congress had intended in 1974 "to approve" the continued availability of private rights of action (A. 234–235). Finding insufficient evidence of such an affirmative intent, Judge Mansfield would have affirmed the judgment of the district court (*ibid.*).

SUMMARY OF ARGUMENT

This Court's recent decisions emphasize that implication of a private right of action presents a question solely of congres-

sional intent. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15–16 (1979). This Court has not, however, previously considered the question whether a private right of action exists under a federal statute in circumstances similar to those presented here. The special character of this case stems from the fact that Congress extensively amended the Commodity Exchange Act in 1974, after numerous courts of appeals and district courts had without exception found private remedies to exist on behalf of commodity traders under various provisions of the Act. In 1974, Congress plainly was aware that the courts had recognized such remedies, and there is no suggestion in the language or legislative history of the 1974 amendments that Congress either disapproved of these remedies or intended to abrogate them. Likewise, based on the law relating to implied causes of action as it existed in 1974, Congress had every reason to believe that private remedies would continue to be available under the Act, without any further legislative action. In these circumstances, even more so than in those analyzed in *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979), it must be presumed that Congress intended that previously recognized private rights of action would continue to be available under the Act.

Even if Congress were required affirmatively to demonstrate its intent to preserve private rights of action under the Act, the language and legislative history of the 1974 amendments supply that evidence. In connection with a provision mandating that the Act preempt all regulatory laws that might otherwise apply to futures trading, Congress enacted a provision that explicitly preserved the jurisdiction of federal and state courts to adjudicate commodity claims. This savings clause was, among other things, obviously intended to permit the courts to continue to entertain private actions under the Act. In addition, Congress rejected the suggestion of the exchanges that they be granted immunity from such private civil actions. Instead, Congress broadened the self-regulatory duties of the exchanges, and thereby expanded the potential liability of exchanges in private suits brought by persons trading through their facilities.

ARGUMENT

I. When Congress Comprehensively Amended the Commodity Exchange Act in 1974, It Was Aware That the Courts had Uniformly Implied Private Rights of Action Under the Act, and It Indicated No Intention to Overrule Those Decisions or Abolish Those Remedies

A. WITHOUT EXCEPTION, THE COURTS RECOGNIZED THAT TRADERS COULD BRING PRIVATE ACTIONS UNDER THE COMMODITY EXCHANGE ACT BEFORE 1974

The question whether a private cause of action was available under the Commodity Exchange Act appears to have been first decided in 1967 (see A. 120 n.16), when the United States District Court for the Northern District of Illinois held that certain commodity traders could bring suit against their futures commission merchants, who had allegedly defrauded them in violation of Section 4b of the Act, 7 U.S.C. (1964 ed.) 6b. *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440, 447 (1967). Without exception, other courts thereafter reached the same result, upholding private rights of action under various provisions of the Act. See *Anderson* v. *Francis I. duPont & Co.*, 291 F. Supp. 705, 710 (D. Minn. 1968); *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 437 (N.D. Cal. 1968), modified, 430 F. 2d 1202 (9th Cir. 1970); *United Egg Producers* v. *Bauer International Corp.*, 311 F. Supp. 1375, 1384 (S.D.N.Y. 1970); *Booth* v. *Peavey Company Commodity Services*, 430 F. 2d 132, 133 (8th Cir. 1970); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338, 1343 (E.D. La. 1972); *Gould* v. *Barnes Brokerage Co.*, 345 F. Supp. 294, 295 (N.D. Tex. 1972); *Johnson* v. *Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764, 766 (S.D. N.Y. 1972); *Arnold* v. *Bache & Co.*, 377 F. Supp. 61, 65 (M.D. Pa. 1973); *Deaktor* v. *L.D. Schreiber & Co.*, 479 F. 2d 529, 534 (7th Cir.), rev'd on other grounds *sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973); *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076, 1084 (S.D.N.Y. 1974), aff'd on other grounds, 550 F. 2d 762 (2d Cir.), cert. denied, 434 U.S. 823 (1977). By 1974, therefore, it was "undisputed that a private cause of action may be maintained under

the Commodity Exchange Act." *Case & Co.* v. *Board of Trade of the City of Chicago*, 523 F. 2d 355, 360 (7th Cir. 1975). See also *Rivers* v. *Rosenthal & Co.*, 634 F. 2d 774, 779 (5th Cir. 1980) (emphasis in original), petition for cert. pending, No. 80–1542 (filed Mar. 10, 1981) ("all courts that decided the issue held unanimously that such a private cause of action was available under the CEA as constituted *prior to 1974*").

For present purposes, as the court of appeals correctly noted (A. 121), the most important of the cases decided prior to 1974 is *Deaktor* v. *L.D. Schreiber & Co.*, *supra*, in which the Seventh Circuit upheld a private right of action on behalf of traders against a contract market and certain of its member firms. Two cases had been consolidated in *Deaktor*. In one case, "short" traders in a particular contract on the Chicago Mercantile Exchange alleged that they suffered financial harm because various members of the Exchange had manipulated and cornered the market in that contract, and the Exchange had failed to enforce its rules, as required by Section 5a(8) of the Act, 7 U.S.C. (1970 ed.) 7a(8). See 479 F. 2d at 530. In the other case, persons who had traded in another contract alleged that the Exchange and certain of its member firms had manipulated the price of the contract in violation of Section 9(b) of the Act, 7 U.S.C. (1970 ed.) 13(b). See 479 F. 2d at 530.

The Seventh Circuit recognized (479 F.2d at 534) that the Act was "at least in part intended to protect the interests of the plaintiff-traders," and it therefore held that "a private cause of action exists under the Commodity Exchange Act in favor of the plaintiffs in these actions." The court also rejected the defendants' contention that the actions should be stayed pending the Commodity Exchange Commission's exercise of primary jurisdiction (479 F. 2d at 533–534). This Court reversed the judgment of the court of appeals with respect to the primary jurisdiction question. 414 U.S. 113. The Court held (*id.* at 115; emphasis added) that "the *Deaktor* plaintiffs, who * * * alleged violations of the [Act] and the rules of the Exchange, should be routed *in the first instance* to the agency whose administrative functions appear to encompass adjudication of the kind of substantive claims made against the Exchange in this case." The significance of the Court's holding is clear inasmuch as it shows that this Court in 1973 understood that a

private right of action was to be implied under the Act in circumstances similar to those presented here.[3]

B. CONGRESS WAS AWARE IN 1974 THAT THE FEDERAL COURTS HAD BEEN ADJUDICATING PRIVATE CLAIMS UNDER THE ACT

In 1974, Congress undertook a thorough reappraisal of the Commodity Exchange Act,[4] which resulted in "the first complete overhaul of the * * * Act since its inception." H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 1 (1974). The 1974 amendments substantially diminished reliance on self-regulation by the contract markets and created the present Commission to administer a "comprehensive regulatory structure." *Ibid.*

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[3] Indeed, the Exchange in *Deaktor* did not even question the existence of a private right of action under the Act. Compare A. 220. To the contrary, in its petition (73-241 Pet. 11), the Exchange supported its primary jurisdiction argument by noting that the "constant threat of harassing suits" had placed it in "an intolerable position." The Exchange noted (*ibid.*) that it "must diligently seek to prevent, deter, and punish violations of its rules; but enforcement of its rules now exposes it to unrestricted attacks in federal courts by disgruntled traders."

[4] Prior to 1974, the Act consisted of legislation enacted in 1922, 1936 and 1968. The Grain Futures Act, ch. 369, 42 Stat. 998 *et seq.*; Commodity Exchange Act, ch. 545, 49 Stat. 1491 *et seq.*; Commodity Exchange Act Amendments of 1968, Pub. L. No. 90-258, 82 Stat. 26 *et seq.* The purposes of the Act were to be achieved primarily through the self-regulatory efforts of contract markets. To secure and maintain designation by the Secretary of Agriculture as a contract market, these organizations were required to adopt rules for preventing manipulation and to be capable of enforcing these rules. See 7 U.S.C. (1970 ed.) 7(d), 7a(8). Federal regulators were afforded limited administrative enforcement powers (see 7 U.S.C. (1970 ed.) 8(a), 9, 13b), and enforcement responsibility was divided between the Secretary of Agriculture and the Commodity Exchange Commission, which consisted of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General. See 7 U.S.C. (1970 ed.) 2.

In 1974, Congress was convinced that the Act provided "an outmoded patchwork of regulation" (120 Cong. Rec. 30463 (1974) (remarks of Sen. Clark)). Congress was particularly concerned with: (1) unchecked and undetected market manipulations and abuses; (2) inadequate self-regulation by contract markets; (3) insufficient government enforcement authority; (4) the absence of effective protections for the increasing number of new traders; and (5) the incipient application of state laws and federal securities laws to commodity matters. See H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 36-49 (1974); S. Rep. No. 93-1131, 93d Cong., 2d Sess. 18-19 (1974); H.R. Rep. No. 93-963, 93d Cong., 2d Sess. 10, 40-58 (1974). Although Congress eventually amended the existing Act, Congress also considered the possibility of repealing the Act and substituting new legislation. See S. 2485, 93d Cong., 1st Sess. (1973); S. 2837, 93d Cong., 1st Sess. (1973).

During this process of reevaluating and revising the Act, Congress frequently was informed that private rights of action had been held to exist under the Act. The availability of this remedy was discussed mainly in the testimony presented by representatives of the commodity exchanges and other commodity professionals, who urged on policy grounds that Congress should act to repeal private rights of action or, at the least, refrain from enacting additional statutory remedies, if such private remedies were to continue to be recognized. During House hearings in 1973, for instance, the representative of three commodity exchanges urged that the exchanges be granted immunity from private rights of action. He stated that "Congress should take steps to insure that federally regulated exchanges are not exposed to * * * astronomical civil liability suits when they seek to discharge their obligations under the law or to cooperate with the suggestion of the regulatory agency." *Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 121 (1973) (statement of Reed Clark) ("*1973 House Hearings*").[5]

In both the Senate and House hearings in 1974, moreover, the president of the Kansas City Board of Trade proposed the insertion of specific language in the Act that would have granted such immunity to contract markets. See *Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Comm. on Agriculture*, 93d Cong., 2d Sess. 123 (1974) (statement of Carlos Bradley) ("*1974 House Hearings*"); *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess., pt. 1, 137 (1974) (statement of Mr. Bradley) ("*1974 Senate Hearings*"). See also *1974 House Hearings* at 62–63 (statement of F. Marion Rhodes). Similarly, representatives of commodity professionals and the exchanges testified that proposed statutory grievance procedures—Commission reparation proceedings and contract market arbitration proceedings—would be "superfluous" and cause confusion because commodity "complainants of course, have access to the courts." *1974 House Hear-*

[5] Significantly, the exchanges also based their opposition to certain proposed amendments to the Act on "the prospect of civil liability" that already existed under the Act (*1973 House Hearings* at 119 (testimony of Mr. Clark)), and "the ultimate opportunity of recourse to the courts" (*id.* at 198 (testimony of Michael Weinberg, Jr.)).

ings at 249 (remarks of Charles W. Chapin); *id.* at 321 (remarks of Sheldon Berens). See also *id.* at 52 (remarks of William F. Brooks); *id.* at 169 (remarks of Frederick Uhlmann); *1974 Senate Hearings* at 403, 415 (remarks of Alvin W. Donahoo); *id.* at pt. 2, 524 and 526 (remarks of Mr. Uhlmann and Warren W. Lebeck).

The significance of this testimony was clearly understood. When the chairman of the House Agriculture Committee introduced the bill that was eventually enacted in 1974, he explained that the "courts [had] implied a private remedy for individual litigants in the Commodity Exchange Act." 119 Cong. Rec. 41333 (1973) (remarks of Rep. Poage). Likewise, the House Report noted the "growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants." H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 46 (1974). See also *id.* at 48. Congress was also aware that Section 5a(8) of the Act, 7 U.S.C. (1970 ed.) 7a(8), as enacted in 1968, required contract markets to enforce their rules, "thereby implicitly giving private parties the right to sue for nonenforcement * * *." 120 Cong. Rec. 10748 (1974) (remarks of Rep. Thone).[6]

C. CONGRESS EVIDENCED NO INTENTION TO ABROGATE THE PRIVATE RIGHTS OF ACTION THAT EXISTED WHEN IT AMENDED THE ACT IN 1974

The intent of Congress is the decisive factor in determining whether a private right of action is to be implied under a federal statute. The circumstances in which the

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[6] Moreover, the Conference Committee Report (S. Conf. Rep. No. 93-1194, 93d Cong., 2d Sess. 38-39 (1974)) suggests that the 1974 Congress was aware of this Court's decision in *Chicago Mercantile Exchange* v. *Deaktor*, *supra*. With respect to an amendment providing discretionary review by the Commission of disciplinary actions brought by exchanges against their members, the Committee noted that "[w]hile as a matter of primary administrative jurisdiction, courts may defer to any review afforded by the Commission, the availability of such review procedure will not affect rights that are otherwise available to persons adversely affected by exchange action." Similarly, the Senate Committee had concluded that the disciplinary review provision did "not deny any person the right to seek relief in the courts." S. Rep. No. 93-1131, 93d Cong., 2d Sess. 8 (1974). See also H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 26 (1974) (letter from Department of Justice); *1974 Senate Hearings*, pt. 3, 724-725, 727-728 (statement of Jerome P. Weiss).

statute was enacted, including the historical and legal context, necessarily must be considered in ascertaining congressional intent. See, *e.g.*, *California* v. *Sierra Club*, No. 79-1252 (Apr. 28, 1981), slip op. 5, 8 n.7; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18 (1979). In this case, Congress plainly understood that private rights of action had been recognized under the Act,[7] and the existence of those remedies was beyond question in 1974. Accordingly, unlike other implied private right of action cases that have been decided by this Court, this case does not involve the question whether Congress intended *to create* a private right of action. Instead, this case presents the question whether Congress intended *to abolish* a previously recognized private remedy when it extensively amended a statute but did not codify the private remedy.[8]

As the court of appeals recognized, it would amount to " 'judicial legislation' for a court to withdraw a remedy" that Congress understood to exist unless Congress plainly evidenced an intent that it should be withdrawn. See A. 150.[9] See also *Edmonds* v. *Compagnie General Transatlantique*, 443 U.S. 256, 273 (1979) ("[o]nce Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively

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[7] Because " 'the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was' " (*Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 711, quoting *Brown* v. *GSA*, 425 U.S. 820, 828 (1976)), it is irrelevant that the cases upon which Congress relied might be decided differently today.

[8] That Congress had no reason to attempt to codify these rights in 1974 is obvious both from the unanimity of the decisional law (see pages 8–10, *supra*) and from the uniform statement of the existing law that was presented by industry representatives during congressional consideration of the 1974 amendments (see pages 11–12, *supra*).

[9] Affirmative proof of congressional intent to alter the existing law concerning private remedies may be required even when it is merely assumed that Congress knows of that precedent. Cf. *California* v. *Sierra Club*, No. 79-1252 (Apr. 28, 1981), slip op. 8 n.7; *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 475 (1959). In *Sierra Club* (slip op. 8 n.7), congressional silence was not accepted as altering the extant precedent holding that no federal remedy existed to contest obstructions of navigable rivers. In *T.I.M.E. Inc.* v. *United States*, *supra*, this Court did not find a private remedy, because the courts had not recognized that remedy under either the Motor Carriers Act of 1935 or the common law, and Congress had not enacted statutory amendments that would have altered the judicial precedent. 359 U.S. at 471–472, 475–476, 478.

alter the statute by causing it to reach different results than Congress envisioned"). Consistent with this rationale, "[t]his Court has frequently accepted a history of federal-court recognition of a cause of action as indicative of the propriety of its implication." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 706 n.40.

This approach accords with settled principles of statutory construction. First, Congress is presumed in reenacting a statute to have approved existing judicial interpretations of the statute. See *Lorillard* v. *Pons*, 434 U.S. 575, 580–581 (1978); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951). In 1974, Congress knew, for example, that an implied private remedy had been recognized under Section 5a(8) of the Act, one of the provisions allegedly violated by the Exchange in this case (see pages 4, 9 & 11–12, *supra*), and when Congress amended that section, it continued the substantive requirement that contract markets enforce their rules. Compare 7 U.S.C. (1970 ed.) 7a(8) with 7 U.S.C. 7a(8). See also Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93–463, Section 407, 88 Stat. 1413–1414. Likewise, Congress increased the statutory penalties for violations of Section 9(b), which had previously been construed as granting a private right of action (see page 9, *supra*), but did not alter the substantive provisions of the section. Compare 7 U.S.C. (1970 ed.) 13(b) with 7 U.S.C. 13(b). It seems clear, therefore, that Congress implicitly approved these private rights of action.[10]

Moreover, Congress will not be found to have repealed a statutory right unless it expressly states its intention to do so, or an irreconcilable conflict exists between the earlier and the later enactment. See, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153, 189–190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 549–551 (1974);

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[10] The Exchange apparently contends (Br. 40) that it is inappropriate to characterize Congress' action as a "reenactment" of the preexisting provisions because the full text of the prior statute was not reprinted in the Public Law. Because Congress completely reviewed the Act in 1974 and was familiar with the precedents permitting private rights of action under the statutory provisions, and because the full text of Sections 5a(8) and 9(b) were reprinted (as amended in 1974) in the House and Senate Committee Reports, that contention certainly elevates form over substance. See, H.R. Rep. No. 93–975, 93d Cong., 2d Sess. 86, 105, 117 (1974); S. Rep. No. 93–1131, 93d Cong., 2d Sess. 53, 73, 85 (1974). See also 120 Cong. Rec. 34737–34750 (1974).

Posadas v. *National City Bank*, 296 U.S. 497, 503 (1936).[11] Congress did not expressly state its intention to close the door to private actions in 1974,[12] and there is no conflict between the previously established right to adjudication of private claims under the Act and the provisions of the 1974 amendments, which authorize Commission injunctive actions in federal district courts as well as administrative reparation proceedings. See 7 U.S.C. 13a–1, 18. By expressly authorizing government enforcement actions, Congress does not, of course, evidence its intent to deprive private parties of the right to sue. See *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 706–707. Likewise, the reparation proceedings established by the 1974 amendments are consistent in principle with the previously recognized private rights of action inasmuch as they show that "Congress was [not] simply unwilling to impose any potential monetary liability to a private suitor." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 21. Indeed, Congress in 1974 provided that damages could be awarded in these proceedings to persons injured by a registered commodity professional's violation of "any provision" of the Act or the Commission's regulations. See 7 U.S.C. 18(a) and 18(e).

It is clear, however, that Congress did not view the reparations remedy as supplanting preexisting private rights of action

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[11] The policy underlying this principle was explained in *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842), in which the Court said: "The more natural, if not the necessary, inference * * * is, that the legislature intend the new laws to be auxiliary to, and in aid of the purposes of, the old law, even when some of the cases provided for may equally be within the reach of each." That principle applies with special force where, as here, the "new" law is an amendment to the "old law," rather than an apparently unrelated enactment.

[12] Congress' unexplained failure in 1974 to enact legislation authorizing *treble damage* awards does not evidence any general hostility to private damage actions. See A. 155 n.38, 162–163. Congress likewise failed to enact S. 2837, 93d Cong., 1st Sess. (1973), which would have replaced the Act with an entirely new statute, and would have included a provision (§ 505(a)) authorizing a "civil action for restitution" in cases of "non-willful" violations of the substantive provisions. Inasmuch as Congress rejected the idea of a new Statute (in favor of substantial amendment of the existing Act), and Congress was aware that private actions had been implied under the existing Act in any event, there is little significance in the fact that this proposal was not enacted.

for market manipulations.[13] Reparation proceedings were intended primarily for the adjudication of customer grievances against registered commodity professionals who act on behalf of members of the public in customer-broker relationships—futures commission merchants, associated persons, commodity trading advisors, commodity pool operators, and floor brokers.[14] Accordingly, Congress did not expressly authorize the bringing of reparation proceedings against either exchanges [15] or traders, such as the defendant "short" traders here, who manipulate commodity prices. See also A. 148–149.

In 1974, therefore, Congress was aware that private remedies had consistently been implied under the Act, and it neither expressed any disapproval of those remedies nor acted to curtail their availability.[16]

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[13] Shortly after the Act was amended in 1974, a leading commentator noted that, "[p]resumably, any injured person will continue to be able to sue in federal or state court on any available legal theory, such as breach of contract, violation of the Act, or common law fraud." Johnson, *The Perimeters of Regulatory Jurisdiction Under The Commodity Futures Trading Commission Act*, 25 Drake L. Rev. 61, 71 (1975) (footnote omitted).

[14] See 7 U.S.C. 6d, 6e, 6k, 6m and 18(a). See also H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 2-3, 22 (1974); S. Rep. No. 93-1131, 93d Cong., 2d Sess. 2, 5 (1975).

[15] Because Congress designed the reparations mechanism for resolving traders' claims against commodity professionals with whom they have direct dealings, it is not surprising that contract markets may not be the subject of reparation complaints. See Exchange Br. 18. Litigation involving contract markets is far more complex than the "small claims court" type grievance proceedings that Congress intended to take place with respect to reparations. See H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 22 (1974); S. Rep. No. 95-850, 95th Cong., 2d Sess. 16 (1978).

[16] Contrary to the Exchange's contention (Br. 24), three special circumstances of the 1974 amendments make it appropriate to focus this inquiry into congressional intent on the Congress that enacted the 1974 amendments rather than on the Congress that originally enacted the substantive provisions allegedly violated in this case. First, as noted earlier, this case, unlike other private right of action cases decided by this Court, involves not whether Congress affirmatively intended to create a private remedy, but rather whether it intended to abrogate a remedy uniformly held to exist. Second, the language and structure of the Act, which this Court has recognized may provide sufficient evidence of congressional intent to recognize a private remedy (*Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 18), is the result of the Act's complete overhaul in 1974. Third, in 1974

II. Congress in 1974 Affirmatively Demonstrated its Intent That Private Rights of Action Continue To Be Available Under the Act

As we have shown (see pages 10–12, *supra*), in contrast to typical implied right of action cases,[17] Congress was not silent in 1974 with respect to private rights of action under the Act. Moreover, certain provisions enacted in 1974 reflect Congress' understanding that private rights of action existed and would continue to be available under the Act. Congress' design for these provisions will be seriously undermined if private rights of action are not permitted to continue. Accordingly, even if it is necessary to show that Congress affirmatively intended in 1974 to continue this form of private remedy, that burden can be satisfied here.

A. THE EXCLUSIVE JURISDICTION PROVISION AND THE JUDICIAL SAVINGS CLAUSE IN SECTION 2(a)(1) OF THE ACT ARE PREDICATED UPON THE CONTINUED EXISTENCE OF PRIVATE RIGHTS OF ACTION

In 1974, the Commission was granted "exclusive jurisdiction with respect to accounts, agreements * * *, and transactions involving" futures contracts. Section 2(a)(1) of the Act, 7 U.S.C. 2. This provision reflects two congressional objectives. First, the Commission was to be the sole government regulator

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Congress perceived enforcement of the Act to be inadequate and therefore authorized new government enforcement powers as well as certain types of private remedies. This Court has often relied on congressional intent concerning private rights of action by assessing that intent at the time meaningful government enforcement authority and express private remedies were enacted. See *e.g., Universities Research Ass'n, Inc.* v. *Coutu*, No. 78–1945 (Apr. 6, 1981), slip op. 20–22. We note in this regard that the Fifth Circuit, the only court of appeals to have ruled that a private right of action is unavailable under the Act, nonetheless agreed that "it is the intent of [the 1974] Congress and the legislative history of [the 1974] enactment that will form the basis of our decision here." *Rivers* v. *Rosenthal & Co.*, *supra*, 634 F. 2d at 783.

[17] See *Northwest Airlines* v. *Transport Workers Union of America, AFL–CIO*, No. 79–1056 (Apr. 20, 1981), slip op. 16, quoting *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 694.

of futures trading.[18] Second, principles of federal law developed under the Act and Commission regulations would "preempt the field insofar as futures regulation is concerned." See S. Conf. Rep. No. 93–1194, 93d Cong., 2d Sess. 35 (1974). Congress thus intended to avoid subjecting participants in futures trading to duplicative or conflicting legal requirements. See *id.* at 36; 120 Cong. Rec. 34997 (1974) (remarks of Sen. Talmadge); *id.* at 34736 (remarks of Rep. Poage); *id.* at 30459 (remarks of Sen. Talmadge). At the same time, however, Congress also made clear that the jurisdiction of the courts to adjudicate commodity claims would not be affected. Section 2(a)(1) of the Act, 7 U.S.C. 2, specifically provides that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State." In light of Congress' awareness that the federal courts had previously and routinely upheld private actions under the Act, the broad language of this savings clause manifests Congress' intent to preserve this federal remedy. See Johnson, *The Perimeters of Regulatory Jurisdiction Under The Commodity Futures Trading Commission Act*, 25 Drake L. Rev. 61, 71 (1975). Indeed, a federal private right of action effectuates Congress' intent that the exclusive federal standards of the Act should govern activities involved in futures trading.

Petitioners attempt (Clayton Br. 39–42; Exchange Br. 22–23; Heinold Br. 43) to avoid the obvious meaning of the savings clause, however, by arguing that it was intended to preserve only private common law, commercial law, and antitrust actions, and not the private rights of action that had previously been recognized under the Act. This contention is plainly inconsistent with Congress' purposes in enacting the exclusive jurisdiction provision. In petitioners' view, for example, the only remedy available to a trader who has suffered monetary damage through the breach of a duty owed to him by a contract market would be a state court tort action. Congress made clear in 1974, however, that "where the * * * State courts retain jurisdiction, the Federal substantive law

[18] Section 2(a)(1) of the Act, 7 U.S.C. 2, provides that the jurisdiction of other state and federal agencies shall not be affected except insofar as the Commission's exclusive jurisdiction applies, but the Commission's exclusive jurisdiction clearly extends to the full range of activities involving futures contracts. See, *e.g.*, S. Conf. Rep. No. 93–1194, 93d Cong., 2d Sess. 35–36 (1974).

embodied in the * * * Act * * * would govern." 120 Cong. Rec. 30464 (1974) (remarks of Sen. Curtis).[19] In deciding whether any duty had been breached, therefore, the state court would have to determine, among other things, whether federal law (the Act and the Commission's regulations) imposed any duty upon the market, and whether the conduct alleged violated that duty. The congressional purpose underlying the exclusive jurisdiction provision would hardly be furthered if the judicial task of interpreting substantive federal law were left mainly to the state courts.[20] Indeed, this Court has previously declined "to adopt such an anomalous construction without some indication that Congress in fact wished to remit the litigation of a federal right to the state courts." *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 19 n.8. That result would be even more anomalous here, given Congress' clearly expressed intention that federal law should govern, a factor that was not present in *Transamerica*.[21]

The Exchange also concedes (Br. 20) that the savings clause was intended to preserve antitrust claims. If there were any merit, however, to the Exchange's argument that Congress intended to immunize exchanges from private damage actions under the Act (and subject them only to penalties assessed by

[19] This does not mean that the exclusive jurisdiction provision expressly preempts the common law or state or federal non-regulatory statute of general applicability. Cf. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236–238 (1947). State common law principles of tort and contracts continue to apply in this area to the extent that those principles are applied in a manner consistent with the Act and the Commisson's regulations. See *P.J. Taggares Co.* v. *New York Mercantile Exchange*, 476 F. Supp. 72, 77–78 (S.D.N.Y. 1979). Cf. *United States* v. *Brien*, 617 F.2d 299, 300–310 (1st Cir.), cert. denied, 446 U.S. 919 (1980).

[20] If no federal private right of action existed, the federal courts would be required to adjudicate commodity issues raised by state law claims in diversity cases. 28 U.S.C. 1332. In such cases, federal court would have to determine how state courts would perceive federal substantive law in order to resolve common law commodity claims. See *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).

[21] Amici curiae Ten United States Commodity Exchanges contend (Br. 28) that Congress desired uniform legal interpretations of the Act, as evidenced by the exclusive jurisdiction provision, and that private rights of action in federal courts would frustrate this goal. See also Exchange Br. 14. This Court has rejected similar arguments as "unsound." See *Pan American Petroleum Corp.* v. *Superior Court of Delaware for New Castle County*, 366 U.S. 656, 664–665 (1961); *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 290–291 (1922).

the Commission) because of a concern that the exchanges could be adversely affected by substantial damage awards,[22] it would be surprising indeed for Congress to have taken special care to preserve the threat of potentially greater treble damage liability for antitrust violations such as those alleged here (see A. 12–13).

The legislative history of the savings clause confirms that it was enacted to preserve, among other things, the availability of the federal courts to adjudicate private rights of action under the Act. The exclusive jurisdiction provision first appeared (without a savings clause) in H.R. 13113, 93d Cong., 2d Sess. § 201 (1974). After the House had passed H.R. 13113, Senator Clark explained to the Senate Committee on Agriculture and Forestry that the exclusive jurisdiction provision might be construed to eliminate private rights of action. Taking the view that private damage actions, and particularly treble damage actions, were a "most effective enforcement tool" (*1974 Senate Hearings*, pt. 1, 205), Senator Clark stated (*ibid.*):

> Unfortunately, the House bill not only does not authorize them, but section 201 of that bill [the exclusive jurisdiction provision] may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate.

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[22] The Exchange grounds this argument on the fact that Congress has required the Commission to take into account the financial condition of an exchange when imposing penalties. See 7 U.S.C. 13a. This provision does not evidence special concern for contract markets, however, because the Commission must make a similar determination before it assesses a monetary penalty against anyone. See 7 U.S.C. 9a. The Exchange also relies (Br. 18–19) on the state enforcement provisions enacted in 1978 as support for its view that Congress intended to eliminate private damage actions against contract markets. The Exchange's reliance upon these provisions is similarly misplaced because Congress authorized state enforcement proceedings in 1978 to supplement Commission efforts to combat fraudulent conduct occurring in *off-exchange* transactions. See 7 U.S.C. (Supp. III) 13a–2; S. Rep. No. 95–850, 95th Cong., 2d Sess. 25–26 (1978); H.R. Rep. No. 95–1181, 95th Cong., 2d Sess. 15–16 (1978). Even if this subsequent legislative enactment has any relevance here, its exclusion of contract markets from state enforcement suits does not suggest that Congress intended that exchanges should henceforth be immune from private damage suits. See A. 164–169. See also *Smith* v. *Groover*, 468 F. Supp. 105, 117–118 (N.D. Ill. 1979).

Other officials also expressed concern that the exclusive jurisdiction provision might be interpreted to deprive federal and state courts of jurisdiction over commodity-related matters generally, and over antitrust, common law, and commercial actions in particular. See e.g., *1974 Senate Hearings*, pt. 1, at 260 (statement of Rep. Rodino), *id.* at pt. 3, 663 (statement of Deputy Assistant Attorney General Clearwaters). Senator Talmadge, the Committee chairman, responded to these concerns (*id.* at pt. 3, 664 (emphasis added)):

> I doubt that this committee, and I doubt the House had in mind depriving either Federal courts or [*sic*] jurisdictions in antitrust matters, or *any other matter*, and certainly not State courts.

Senator Talmadge also suggested that the Department of Justice assist the Committee in drafting appropriate language for insertion in the House bill. *Ibid.* On the following day, Professor Roy A. Schotland of the Georgetown University Law Center urged that the committee include "explicit language in the statute that Federal and State courts are still open if a complainant prefers to go trial there" rather than bring reparation proceedings before the Commission. *Id.* at pt. 3, 737.

The Committee thereafter amended its version of H.R. 13113 by adding to Section 2(a)(1) the judicial savings clause that was ultimately enacted. See. S. Rep. No. 93–1131, 93d Cong., 2d Sess. 54 (1974). The Committee explained (*id.* at 6) that the savings clause would "make clear" that while "the Commission's jurisdiction, where applicable, supersedes State as well as Federal agencies; * * * Federal and State courts retain their jurisdiction." In apparent reference to Professor Schotland's concern about the reparation provisions to be enacted in Section 14 of the Act, the committee stated (*id.* at 23; emphasis added) that the broad savings clause was intended "to make clear that *nothing in the Act* should be construed as superseding or limiting jurisdiction of Federal and State courts." Indeed, Senator Talmadge explained that under the Senate bill (120 Cong. Rec. 30459 (1974)):

> The vesting in the Commission of the authority to have administrative law judges and apply a broad spec-

trum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. [23]

The Conference Committee adopted the Senate Committee's savings clause as well as its interpretation that "nothing in the Act" affected "presently conferred" judicial jurisdiction. See S. Conf. Rep. No. 93–1194. 93d Cong., 2d Sess. 35 (1974). See also 120 Cong. Rec. 34997 (1974) (remarks of Sen. Talmadge); *id.* at 34737 (remarks of Rep. Poage).

B. IN ENACTING SECTIONS 5a(12) AND 8a(7) OF THE ACT, CONGRESS ENSURED THAT CONTRACT MARKETS WOULD CONTINUE TO BE SUBJECT TO PRIVATE DAMAGE ACTIONS FOR FAILING TO DISCHARGE THEIR SELF-REGULATORY DUTIES

Congress was aware in 1974 that the lower federal courts had recognized an implied private right of action for damages against contract markets for failing to enforce their rules as required by Section 5a(8) of the Act, 7 U.S.C. (1970 ed.) 7a(8). See pages 8–12, *supra*. Congress also knew that some contract markets had attempted to avoid such litigation by "pruning out" certain rules that they believed to be difficult to enforce. See 119 Cong. Rec. 41333 (1973). See also H.R. Rep. No. 93–975, 93d Cong., 2d Sess. 46 (1974). In addition, Congress perceived that the government was hampered in its efforts to curtail the contract markets' abdication of their responsibilities because of the "limited federal authority to require the exchanges to make and issue rules appropriate to enforcement of the Act" (*ibid.*). Thus, at a time when Congress believed exchange self-regulation to be inadequate generally, Congress found that the self-regulatory efforts of the exchanges were becoming progressively more limited.

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[23] Senator Talmadge also expressed the hope (120 Cong. Rec. 30459 (1974)) that the Commission's broad adjudicatory authority would "somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determination by the courts are expressly preserved." Senator Talmadge certainly was not suggesting that the savings clause merely preserved appellate jurisdiction over administrative adjudications, which had been expressly authorized prior to 1974 and was also expressly provided for in the Act as amended in 1974. See 7 U.S.C. (1970 ed.) 9, 13a, and 13b; 7 U.S.C. 9, 13a, 13b, and 18(g).

The exchanges suggested that this problem would be solved if they were granted at least partial immunity from private damage actions. See pages 11–12, *supra*. The implicit premise of their proposal was that a grant of immunity would encourage them to adopt a broad spectrum of rigorous rules because they would then have no fear of incurring liability for failing to enforce any rule that might prove difficult to enforce. Another possible solution, of course, was to limit the duty imposed on contract markets by Section 5a(8) of the Act. If either of these approaches had been adopted by Congress, an intention to eliminate private damage actions against exchanges might well be inferred. See Exchange Br. 34. However, Congress did not adopt either approach.

Congress instead enacted two new provisions, Sections 5a(12) and 8a(7) of the Act, 7 U.S.C. 7a(12) and 12a(7), which granted to the Commission a pervasive oversight authority with respect to exchange rules (see H.R. Rep. No. 93–975, 93d Cong., 2d Sess. 46, 48 (1974)). Section 5a(12) requires that the exchanges submit virtually all substantive rules and rule changes to the Commission, which must approve them before they may take effect. 7 U.S.C. 7a(12). See also 17 C.F.R. 1.41. Likewise, Section 8a(7) authorizes the Commission to alter or supplement exchange rules so as to maintain or expand the degree of self-regulation necessary to protect traders in the market. 7 U.S.C. 12a(7).[24] Congress thus recognized that there was great force to the premise underlying the exchanges' argument in favor of immunity: if the exchanges continued to have relatively unbridled authority to "prune out" rules, and if they could limit their potential liability in private actions by "pruning out" rules that might prove difficult to enforce, they would have a strong incentive to do so—in contravention of one of the major policy judgments of the Act. Although Congress found this premise unassailable, it rejected the exchanges' conclusion that they should therefore be granted immunity. In-

[24] These provisions were described by Representative Thone as remedying the "perverse effect" on self-regulation of implied private rights of action under Section 5a(8) of the Act. 120 Cong. Rec. 10748 (1974). See also *id.* at 10736–10737 (remarks of Rep. Poage); H.R. Rep. No. 93–975, 93d Cong., 2d Sess. 46, 48 (1974). Likewise, Senator Talmadge suggested that these provisions would grant the Commission "the tools to require that the exchanges perform their regulatory functions better." 120 Cong. Rec. 30462 (1974).

stead, Congress empowered the Commission to choose which rules contract markets may now "prune out" or be required to enforce, thus demonstrating its intention to continue the threat of private suits under Section 5a(8) as a spur to the exchanges to provide ample protection to traders.[25]

C. THE EVIDENCE OF CONGRESSIONAL INTENT TO PRESERVE PRIVATE RIGHTS OF ACTION UNDER THE ACT IS FAR MORE COMPELLING THAN THAT WHICH THIS COURT FOUND SUFFICIENT TO CREATE A PRIVATE REMEDY IN *CANNON*

In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court held that a private right of action was available under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* Although Title IX did not expressly provide a private remedy, the Court concluded that the relevant legislative history "rather plainly indicates that Congress intended to create * * * a [private] remedy" (441 U.S. at 694). The Court found particularly persuasive the fact that Congress had patterned Title IX of the Education Amendments after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, under which a private right of action had previously been implied by one court of appeals and four district courts (441 U.S. at 696 & nn.20, 21). The Court concluded that it was both "appropriate" and "realistic to presume that Congress was thoroughly familiar with" these decisions, and that it "expected its enactment to be interpreted in conformity with them" (*id.* at 699). The Court stated that (*id.* at 702–703; footnotes omitted):

> [T]he very persistence—before 1972 and since, among judges and executive officials, as well as among litigants

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[25] The contention of amici curiae Ten United States Commodity Exchanges (Br 28–30) that the self-regulatory efforts of the contract markets will be frustrated by the continued recognition of private suits under Section 5a(8) is an argument that should properly be addressed to Congress—as it was, unsuccessfully, in 1974. At all events, we believe that this contention lacks merit because the practical effect on contract markets of private suits will largely depend on the particular standards to be applied in determining liability, an issue that remains to be resolved by the lower federal courts. Although the question is not presented here, the Commission believes that the interests of all parties will be protected if contract markets are held to be liable under Section 5a(8) only if they deliberately fail to enforce their rules or fail to do so because of gross negligence.

> and their counsel, and even implicit in decisions of this Court—of the assumption that both Title VI and Title IX created a private right of action for the victims of illegal discrimination and the absence of legislative action to change that assumption provide further evidence that Congress at least acquiesces in, and apparently affirms, that assumption.

The evidence here—that Congress knew in 1974 that private rights of action had consistently been implied under the Commodity Exchange Act and expected that those rights would continue to be available—is even more persuasive than the evidence upon which the Court relied in *Cannon*. Congress was specifically advised by representatives of the commodity industry that private rights of action were available under the Act; Congress referred to those rights of action during its deliberations; it premised portions of its regulatory reforms on those private rights of action; and, finally, in Section 2(a)(1), Congress expressly preserved the jurisdiction of the courts to entertain these actions.[26] Moreover, at that time Congress still "tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 718 (Rehnquist, J., concurring) (emphasis in original). Indeed, "[c]ases such as *J.I. Case Co.* v. *Borak*, [377 U.S. 426 (1964),] and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task" (441 U.S. at 718). As the Court has recognized, "[i]t was *after* 1972 that this Court decided *Cort v. Ash* and * * * other cases" establishing the "strict approach followed in our recent cases" (*id.* at 698 (emphasis in original)). See also *id.* at 698 n.23. It was also only after 1974

[26] To be sure, the explicit "right creating" language that the Court also relied on in *Cannon* (see 441 U.S. at 690–693 n.13) is not present here. However, as the court of appeals recognized (A. 160), while "the form in which Congress casts a statutory provision may serve as some indicator of the propriety of implication * * * this is by no means determinative. When, as here, the legislative history and the 'circumstances of [a statute's] enactment' evince a clear intent to preserve a private cause of action, the form in which this intent is expressed cannot be permitted to become an obstacle to its realization."

that this new judicial approach crystallized.[27] Accordingly, it is in light of the legal context existing in 1974 that the intent of Congress must be ascertained here.

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[27] There is no merit to the contention (see Exchange Br. 23) that traders who are "speculators" are not within the special class of persons for whose benefit Congress enacted the Act, and that they therefore fail to meet the first prong of the test articulated in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). See A. 129–137. Congress has continually acknowledged that "thousands of speculative traders, representing almost every line of human endeavor," participate in futures trading. See H.R. Rep. No. 743, 90th Cong., 1st Sess. 2 (1967); 80 Cong. Rec. 8289–8293 (1936). These "speculators" are necessary to the proper functioning of a futures market because they assume the risk that "hedgers" seek to avoid, and thereby provide the market liquidity necessary to ensure that the price of a futures contract accurately reflects forces of supply and demand. The congressional purpose set forth in the Act recognizes that the markets would cease to attract the participation of such traders, and therefore fail to serve the national interest in these markets, if effective curbs on manipulation and other market disturbances did not exist. 7 U.S.C. 5. To accomplish its goal, Congress has prohibited manipulation (7 U.S.C. 9, 13(b) and 13b), and it has imposed on contract markets a duty to prevent manipulation as a condition of doing business (7 U.S.C. 7(d). Similarly, contract markets are required (7 U.S.C. 7a(8) and 12a(7)) to enforce their rules governing trading, which protect all traders, whether members of "the public generally" or "persons engaged in the business of buying and selling [a] commodity" (7 U.S.C. 5). See also Grain Futures Act of 1922, ch. 369, 42 Stat. 999.

The suggestion that Congress enacted these provisions for the special benefit only of hedgers and consumers of commodities would require the conclusion that Congress would have intended only those persons to have a private right of action in the case of manipulation. There is no evidence that Congress ever has had such a limited intent. Indeed, in 1974, Congress reaffirmed its intent to protect "speculators" from manipulated markets. It was recognized that "[e]veryone who uses the commodity futures market deserves" to be "adequately protected from any price fluctuations brought about by manipulation of the commodity futures market." 120 Cong. Rec. 30466 (1974) (remarks of Sen. Cranston). Thus, Congress intended that "the integrity and adequacy of futures markets be assured to all parties." *Id.* at 30458 (1974) (remarks of Sen. Talmadge). See also *id.* at 34999 (remarks of Sen. Clark); *id.* at 35000 (remarks of Sen. Humphrey); *id.* at 30467 (remarks of Sen. Taft); *id.* at 10739 (remarks of Rep. Mayne); id. at 10740 (remarks of Rep. Brown); *id.* at 10742 (remarks of Rep. Sebelius).

The court of appeals also found, of course, that the remaining prongs of the *Cort* test were satisfied, and we agree with the court's discussion of those issues. See A. 126–170.

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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